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Supreme Court of the United States

OCTOBER TERM, 1954

No. 312

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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No.

GRAYSON-ROBINSON STORES, INC.,

Appellant,

vs.

THE LIONEL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

The Opinions Below

The majority and concurring opinions in the New Jersey Supreme Court are officially reported at 15 N. J. 191 and 15 N. J. 202; they are unofficially reported at 104 A(2d) 304 and 104 A(2d) 309. The opinion in the Superior Court of New Jersey, Chancery Division, Essex County, in which the cause originated, is officially reported at 27 N. J. Super. 54, and is unofficially reported at 98 A(2d) 623.

Grounds on Which Jurisdiction Is Invoked

i) Nature of Proceeding

This action was commenced by appellee in the Superior Court of New Jersey, Essex County, pursuant to the New Jersey "fair trade" law, to enjoin the appellant from sell-

ing products manufactured by the appellee at prices below the "fair trade" prices for those products fixed by the appellee, and to recover damages for sales at such lower prices.

ii) The Judgment Appealed From

The judgment sought to be reviewed is a final judgment of the Supreme Court of New Jersey, dated April 5, 1954, and entered in the office of the Clerk of the Supreme Court of New Jersey on April 5, 1954 granting injunctive relief; the notice of appeal was filed July 1, 1954 in the New Jersey Superior Court, Essex County.

iii) Statute Believed to Confer Jurisdiction

The statutory provision believed to confer jurisdiction of the appeal on this Court is Title 28 United States Code, § 1257(2).

iv) Cases Believed to Sustain Jurisdiction

Winters v. *New York,* 333 U. S. 507, 92 L. ed. 840;
Prudential Insurance Co. v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342;
Charleston Federal Savings & Loan Ass'n. v. *Alderson,* 324 U. S. 888, 89 L. ed. 1436.

v) The State Statute Involved

The appeal involves the validity of Title 56 of the Revised Statutes of New Jersey, §§ 4-3 to 4-6, inclusive. The pertinent text is found in the appendix hereto.

Questions Presented by the Appeal

1. Is The New Jersey Fair Trade Act, New Jersey Revised Statutes §§ 56:4-3 *et seq.,* and particularly § 56:4-6 thereof, as it applies to persons who are not parties to any

contract entered into pursuant to § 56:4-5 of the said Act, invalid under the Fourteenth Amendment to the Constitution of the United States as a deprivation of property without due process of law?

2. Is the said New Jersey Fair Trade Act, and particularly § 56:4-6 thereof, unconstitutional in violation of the commerce clause (Art. I, § 8, cl. 3) of the Constitution of the United States, as it applies to the retail sale in New Jersey of goods which are distributed by the manufacturer thereof in interstate commerce?

Statement of the Case

The appellant, a California corporation, operates "S. Klein on the Square," a department store in Newark, New Jersey. The S. Klein store policy is to offer merchandise at bargain prices. This is done by reducing costly sales service provided by other stores, and by the economies of large-scale purchasing.

The appellee, a New York corporation, manufactures toy trains and accessories which it distributes in interstate commerce throughout the country. Appellee sought to fix the prices at which these trains can be sold at retail throughout the United States, including the State of New Jersey. To this end, appellee entered into "agreements" with certain New Jersey retailers other than appellant, under which those retailers agreed to sell the appellee's toy trains at prices fixed by the appellee. Section 56:4-6 of the New Jersey Revised Statutes (the so-called "non-signer" clause found in all state "fair trade" acts), prohibits *all* retailers in the state from selling below prices established by an agreement between a vendor and *any* retailer within the state. Appellant, however, not being a party to any such agreement, offered appellee's trains, in accordance with its regular trade policy, at prices below

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those fixed under the appellee's agreements with other retailers. Appellee thereupon commenced this action in the New Jersey Superior Court, Essex County, (a) to enjoin the appellant from continuing to offer appellee's products at below appellee's "fair trade" prices, and (b) to recover damages.

Appellant then moved on the complaint, a moving affidavit, and certain stipulated facts, for summary judgment, on the ground that "there is no genuine issue as to any material fact challenged, and that the defendants are entitled to summary judgment as a matter of law." The Superior Court granted appellant's motion, and dismissed the complaint. The appellee thereupon appealed to the Appellate Division of the Superior Court. Prior to a hearing in the Appellate Division, the cause was certified to the Supreme Court of New Jersey by order of the Supreme Court. The New Jersey Supreme Court reversed the decision of the Superior Court, so far as it denied injunctive relief, and directed that a judgment granting such relief be entered in appellee's favor. An amended summary judgment was thereupon entered prohibiting appellant from selling appellee's toy trains at other than the prices fixed therefor by the appellee.

Raising the Federal Questions

The federal questions presented by this appeal were timely raised by appellant in the Superior Court as independent grounds for granting appellant's motion for summary judgment dismissing the action, and were presented by appellant to the New Jersey Supreme Court as independent grounds for sustaining the judgment of the lower court. Each of these federal questions was necessarily passed upon by the New Jersey Supreme Court in sustaining the constitutionality of the New Jersey statute and in awarding final judgment thereunder. All this is established by the following excerpts from the opinions in the Superior Court and in the Supreme Court:

A. *The Due Process Question*

The Superior Court said:

> ". . . the defendant presents many points, among them that the New Jersey Fair Trade Act and the Federal McGuire Act, insofar as they attempt to bind non-signers are unconstitutional: (1) being in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and of Article I, Section 1, of the State Constitution; because they deprive the defendant of its property right to sell merchandise at the price it sees fit; and (2) because they unlawfully delegate to private persons, manufacturers and producers, the power to fix prices of commodities not affected with a public interest, without any standards or regulations governing the exercise of the delegated power" (*infra*, p. 36).

The Supreme Court said:

> "The Fair Trade Act is asserted by the defendant to violate the state and federal constitutions upon three grounds. The first two of these are, (a) that the Fair Trade Act constitutes a deprivation of property of the defendant without due process of law or a denial of equal protection of the law, in contravention of the 14th Amendment to the United States Constitution, and also of N. J. Const. 1947, Art. I, pars. 1, 5, and (b) that the Fair Trade Act constitutes an unlawful delegation of legislative power, see N. J. Const. 1947, Art. IV, sec. 1, par. 1, and in this respect also violative of the due process clause of the 14th Amendment, *supra*. • • •.
>
> We find no basis pertinent to the resolution of the Constitutional questions involved upon which to differentiate the Illinois statute considered in the *Old Dearborn* case, *supra*, from the New Jersey Fair Trade Act. To overrule the decision of the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, *supra*, would require a declaration that we are no longer bound by the *Old*

Dearborn case, *supra*. It is our conclusion that the *Old Dearborn* case, *supra*, has not been overruled by the United States Supreme Court and is dispositive here" (*infra*, pp. 28-9).

B. *The Commerce Clause Question*

In the New Jersey Superior Court, appellant urged as a separate ground for granting its motion that the New Jersey statute, insofar as it applied to goods like the appellee's moving in interstate commerce, imposed an unconstitutional burden on such commerce in violation of Article 1, Section 8 of the Federal Constitution. The Superior Court found it "unnecessary to pass on this and other questions" (*infra*, p. 42).

In the New Jersey Supreme Court, appellant again urged the unconstitutionality of the New Jersey statute under the commerce clause as an independent ground for sustaining the Superior Court's judgment dismissing the action. With respect to this question the New Jersey Supreme Court stated:

> "The defendant also asserts that the New Jersey Fair Trade Act constitutes an unlawful burden on commerce. Under the decisions above adverted to this argument is without merit" (*infra*, p. 31).

The Federal Questions Presented Are Substantial

1. The Fourteenth Amendment

This appeal squarely requires this Court, we think for the first time (Cf. *Schwegmann Bros. Giant Super Market v. Eli Lilly & Co.*, 205 F. (2d) 788 (C. A. 5, 1953), cert. den., 346 U. S. 856, 98 L. Ed. Adv. 154 (1953)), to determine whether it still adheres to its decision in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936). *Old Dearborn* sustained the constitutionality of the "non-signer" provision of the

Illinois Fair Trade Act, and is the constitutional basis for the "non-signer" clauses in the "fair trade" laws of some forty states.

The New Jersey statute here involved is almost identical with the Illinois statute, and the same due process attacks were made upon the Illinois statute in *Old Dearborn* as are made here. We respectfully urge, however, that *Old Dearborn's* reasoning does not survive re-examination; that its basic premise has been invalidated by this Court's recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (*"First Schwegmann"*); and that *Old Dearborn* should now be overruled.

The New Jersey statute here requires, *inter alia*, that all retailers of branded merchandise in the State of New Jersey adhere to the retail prices for such merchandise fixed by the manufacturer thereof in an agreement between the manufacturer and any one retailer in the State of New Jersey. Appellant, a "non-signing" retailer, here asserts, as it asserted below, (1) that the State of New Jersey cannot, consistently with the due process clause, require it to sell its property at any particular price, regardless of who fixes the price, solely on the ground that the property bears a brand-name or trademark, and (2) that if New Jersey has the power to fix the price at which appellant can sell that property, New Jersey cannot, consistent with the due process clause, delegate the power to fix the price to private persons, such as the manufacturer, imposing no standards whatever as to a) whether *any* prices shall be fixed, and b) the particular prices to *be* fixed.

As a token of the substantiality of the due process questions here raised, in the face of *Old Dearborn*, we may note that, in recent years, several state courts of last resort have declined to accept the validity of *Old Dearborn's* reasoning, and have held state "fair trade" legislation violative of state due process. *Liquor Stores, Inc.* v. *Con-*

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tinental Distilling Corp., 40 So. (2d) 371 (1949) (Sup. Ct. Fla.; not officially reported); *Miles Laboratories, Inc.* v. *Eckerd*, CCH 1954 Trade Cases ¶67,700 (Sup. Ct. Fla.; not officially reported); *Grayson-Robinson Stores, Inc.* v. *Oneida Ltd.*, 209 Ga. 613, 75 S. E. (2d) 161 (1953), cert. den. 346 U. S. 823, 98 L. ed. Adv. 42 (1953); *Shakespeare Co.* v. *Lippmann's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N. W. (2d) 268 (1952); see also *General Electric Co.* v. *J. L. Brandeis & Sons*, CCH 1954 Trade Cases ¶67,682 (Nebr. Dist. Ct. 1954); *Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (Ark. Chancery Ct. 1954), *ibid.* ¶67,781; *cf. Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (U. S. D. C. Ark. 1954), 118 Fed. Supp. 541. Several state courts of last resort, applying state constitutions, have indeed followed *Old Dearborn*, but a reading of their opinions suggests that, in doing so, they have been persuaded more by the force of this Court's authority than by the force of its rationale. *E.g.*, see *Bourjois Sales Corp.* v. *Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) overruling (on the authority of *Old Dearborn*) *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936) (holding New York statute unconstitutional); see also opinion of New Jersey Supreme Court in instant case (*infra*, p. 29), speaking of state constitutional questions:

> "• • • we are bound by that decision of the United States Supreme Court [Old Dearborn] until it is overruled by the United States Supreme Court."

The Old Dearborn Rationale

The basic premise of *Old Dearborn* is that state fair trade laws are not "legislative price fixing", even though the plain fact is that it is the authority of the state, and that alone, which requires all retailers to abide by the resale price which some other retailer has agreed to respect (see 299 U. S. at 192). It must be noted that the opinion

of this Court in *Old Dearborn* accepted the authority of *Tyson & Bro.-United Theatre Ticket Offices* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, holding that a state could not fix the resale price of theatre tickets, and of *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, holding that a state could not fix the charge for the services of an employment agency (see 299 U. S. at 191-2). To sustain the constitutionality of the Illinois Fair Trade Act, the *Old Dearborn* Court therefore could not, and did not, assert the power of the State to fix prices. Instead, it was at pains to note that the resale price restriction applied only to those who have acquired the subject merchandise with "knowledge" of the "restriction" on the resale price; that it applies only to "a forbidden use of the trade-mark, brand or name" attached to the merchandise in connection with its resale, and not to the merchandise apart from the "trade-mark, brand or name" (299 U. S. at 193). The Court then stated (*ibid.*):

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned."

This reasoning, we submit, begged the real question. There *is* no "existing restriction" on the non-signer's resale price unless the State imposes one. And the non-signer's knowledge, before he acquires the property, that the State has *attempted* to impose it does not give the State *power* to impose it. In short, *Old Dearborn* avoids deciding whether the State can enforce uniform resale

prices by an illogical argument founded on the fictional premise that the recalcitrant retailer has given his "assent" to the price restriction.

The fiction of implied "assent" was also *Old Dearborn's* answer to the claim of unconstitutional delegation of power to fix prices (293 U. S. at 194):

> "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond*, 266 U. S. 137, 143, 57 L. ed. 156, 158, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1188, 56 S. Ct. 855. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction in invitum was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."

The Schwegmann Case

This Court's recent opinion in *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U. S. 384, 95 L. ed. 1035 (1951) (*"First Schwegmann"*) destroyed the implied "assent" premise, on which *Old Dearborn* was based. In this connection, we may note the conclusion of HOLMES, *C.J.*, dissenting, in *Schwegmann Bros. Giant Super Mkts.* v. *Eli Lilly & Co.*, 205 F. (2d) 788, 794 (CA 5, 1953) that *First Schwegmann* "has opened the door for a re-consideration of the constitutionality of fair trade laws as price fixing statutes."

The issue in *First Schwegmann* was whether the enforcement of non-signer clauses under state "fair trade"

laws constituted combinations or conspiracies in restraint of trade under the Sherman Antitrust Act, as amended by the Miller-Tydings Act (Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, Act of Aug. 17, 1937, C. 690, Title VII, 50 Stat. 693, 15 U. S. C. § 1). The Miller-Tydings Act had exempted from the prohibitions of the Sherman Act "contracts or agreements prescribing minimum prices" for the resale of certain commodities, when such contracts or agreements were valid under state law with respect to intrastate transactions. It was claimed in *First Schwegmann* that this exemption authorized enforcement of "fair trade" prices against the non-signer as well as against parties to resale price maintenance contracts. *Old Dearborn* had said that the non-signer gives his "assent" to the price restriction by voluntarily purchasing the goods for resale. In *First Schwegmann*, this Court said that it was precisely the *absence* of consent by the non-signer which placed enforcement against him outside the Miller-Tydings exemption:

> "They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price-fixing by contract or agreement; that is price-fixing by compulsion. That is not following the course of consensual agreement; that is resort to coercion" (341 U. S. at 388).

First Schwegmann thus repudiates the fictional premise on which *Old Dearborn's* holding was founded—that the non-signer's obligation to respect the "fair trade" price has its source in the non-signer's "assent", not in "legislative price-fixing". And once the non-signer clause is frankly acknowleged to involve price-fixing by legislative fiat, it is apparent that the due process questions presented here are precisely the questions which were avoided —and not decided—by *Old Dearborn*: Does the State have

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the power to fix resale prices on branded merchandise? If the State has such power, can it delegate to private persons the power to determine *when* resale prices shall be fixed, and *what* the prices shall be? Those questions are substantial, and have not been determined by this Court.

The Non-Signer Clause Violates the Fourteenth Amendment

This Court has gone far to sustain the power of the Federal and State Governments to fix prices. See *e.g., Nebbia* v. *New York,* 291 U. S. 502 (1934), and cases collected, *Nebbia* states that "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty" (291 U. S. at 539). The New Jersey Fair Trade Act fails to meet this standard of due process.

In cases in which price regulation has hitherto been validated in this Court it has been possible to demonstrate that the challenged legislation was designed to deal with an evil affecting the particular industry being regulated, or, to deal with a general inflation or the like threatening all industry (*e.g. Block* v. *Hirsh,* 256 U. S. 135, 65 L. ed. 865) and that the remedial measures provided were reasonably designed to deal with the problem which called them forth. Accordingly, we need not argue here that the State of New Jersey would not, under any circumstances, have power to regulate the resale price of toy trains. The New Jersey statute here is applicable indiscriminately to steel girders as well as to toy trains, to goods having limited and local distribution, as well as nationally advertised goods, to sales by wholesalers, by jobbers to industrial users, as well as to sales by retailers to private consumers.

We venture to say that no other price-fixing legislation heretofore validated by this Court—with the exception of temporary measures against inflation—is applicable to any thing like the wide range of goods and industries to which state "fair trade" statutes apply.

In cases where price legislation applied to a relatively large number of goods or services, some machinery has generally been provided by which the legislative policy could be responsibly particularized and applied to individual industries and individual situations. No such mechanism is here provided for determining whether, in particular industries, or at particular resale levels, conditions exist which justify the imposition of price restrictions, or for otherwise adapting legislative policy to self-evident differences in different industries. Indeed, the statute contains no statement of legislative findings of the supposed evils to which the legislatively enforced price retrictions are addressed.

The power of the "vendor" to determine whether resale price restrictions shall become applicable does not supply any machinery for adapting legislative policy to particular situations. The "vendor" who makes the restrictions applicable is left free to create the restrictions for private reasons of his own, and for reasons wholly unrelated to the legislative policy. The range of private reasons, unrelated to any standard of public welfare, which may move the vendor to act, is suggested by the facts (a) that resale price maintenance was unlawful at common law, (b) was, until recently, a federal crime (*First Schwegmann*) in every state, and indeed(c) is still a federal crime in states which do not have "fair trade" laws.

In sum, the statute is completely arbitrary because, being applicable indiscriminately to resales at every level, in all industries, it is not and cannot be based upon a responsible legislative determination that evils exist which

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require the remedy of resale price maintenance at any particular resale level in any particular industry or industries.

But worst of all, the price restrictions actually imposed are themselves "irrelevant to [any] policy the legislature is free to adopt" (see *Nebbia, supra*) and are determined and enforced by a procedure so arbitrary as to offend due process. The statute leaves to the "vendor" (who may even be a person other than the manufacturer, acting without the manufacturer's consent, *Schenley Products Co., et al.* v. *Franklin Stores Co.*, 124 N. J. Eq. 100, 199 A. 402 (N. J. Ct. of E. & A. 1938); *Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.* (N. J. Chancery Ct. 1941 19 A. (2d) 454), the power to determine (a) whether *any* compulsory resale price shall be fixed, and (b) *what* that price will be. The statute provides no standards for relating either of these private determinations to any statutory policy. The appellant is here enjoined from selling the appellee's toy trains for $16.87. But if the appellee and appellant had agreed to fix the price at $16.87, New Jersey would *compel* every retailer in the State to sell *at* that price.

If the State has constitutional power to enforce a uniform resale price structure, there is no power to give to private parties the right to legislate *when* there shall be a uniform price, and *what* that uniform price shall be. Such a delegation of legislative power to private persons is so arbitrary as plainly to violate due process. *Eubank* v. *Richmond*, 226 U. S. 137, 143, 57 L. ed. 156, 159; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1189. As *Carter* says:

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to others in the same business. * * *

> "The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." [Citing *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. at p. 537, 79 L. ed. 1584, and cases cited *supra*, p. 14.] (298 U. S. at 311, 80 L. ed. at 1189.)

Old Dearborn is no bar to consideration of the due process question raised, nor to the reversal of the judgment below. "To the decision of an underlying question of constitutional law no * * * finality attaches. To endure, it must be right." George Bancroft, quoted at 2 Warren, The Supreme Court in United States History, 749. "* * * [It] is of the highest importance that the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes." 2 Warren, *id.*

2. The Commerce Clause

Appellant contends that the New Jersey statute, as here applied, is unconstitutional under the commerce clause of the federal Constitution, despite the effort of Congress to immunize "fair trade" legislation from commerce clause objections in the McGuire Act (15 U. S. C. § 45; quoted, *infra*, pp. 22, *et seq.*). The commerce clause aspects of "fair trade" were not raised or determined in *Old Dearborn, supra.*

It was clear from *First Schwegmann, supra,* that the application of the New Jersey Fair Trade Law to goods like appellee's, distributed in interstate commerce, affects the flow of such goods in commerce. By section 5(a)(4) of the Federal Trade Commission Act, as amended by the McGuire Act, Congress attempted to immunize state "fair trade" laws from the resulting commerce clause difficulties. Section 5 exempts "fair trade" contracts, and the enforcement of state "non-signer" clauses from the prohibition of the anti-trust laws. Section 5(a)(4) then provides:

> "Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any rights or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restrain upon, or interference, with commerce."

The essential question here presented is whether this declaration by Congress, is sufficient to validate state "fair trade" laws under the commerce clause. See *e.g Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 89 L. ed. 1915. If not, the New Jersey statute is invalid under the commerce clause, and the judgment here must be reversed.

We are aware, as this Court said in *Southern Pacific Co.* v. *Arizona, supra,* at 769, that "Congress has undoubted power to redefine the distribution of power over interstate commerce." As a corollary to this principle, there are now four established categories into which state regulations affecting commerce may fall, depending on the nature and subject-matter of the regulation, and the silence, acquiescence or disapproval of Congress: (1) Congress being silent, the state regulation is valid under the commerce clause (*Robertson* v. *California,* 328 U. S. 440); (2) the state regulation, otherwise valid, is invalid because Congress has occupied the field or otherwise disapproved (*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 230); (3) Congress being silent, the state regulation is

invalid under the commerce clause (*Southern Pacific* v. *Arizona, supra;* (4) state regulation, otherwise invalid, is valid because Congress consents (*In re Rahrer,* 140 U. S. 546, 35 L. ed. 572).

We suggest here that the right of Congress to cede jurisdiction over commerce to the States is not an unlimited one and does not extend to all subjects of regulation; that Congress cannot take all matters otherwise falling in (3) and put them in (4).

The kinds of cases in which this Court has found state regulation affecting commerce to be valid by virtue of special Congressional approval are not overly numerous, possibly because only a "few unique federal statutes" (*United States* v. *Public Utilities Commission,* 345 U. S. 295, 304, 97 L. ed. 1020, 1031) provide such approval. States which adopted prohibition laws were permitted to prohibit resale, within the state, of liquors received in interstate commerce. *In re Rahrer, supra,* 576. States which had adopted laws to prohibit prison labor from competing with free labor within the state, were permitted to prohibit the sale, within the state, of imported prison goods. *Whitfield* v. *Ohio,* 297 U. S. 431. States were permitted to levy unemployment insurance taxes on employers engaged in commerce within the State (*Perkins* v. *Pennsylvania,* 314 U. S. 586; *International Shoe Co.* v. *Washington,* 326 U. S. 310).

Prudential Insurance Co. v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342, which, relying on the McCarran Act (15 U. S. C. §§ 1011-1015), sustained a South Carolina tax on an interstate insurer, was at pains to note first, that the insurance business was "atypical", and, second, that the solution of the commerce clause problems presented by state regulation and taxation of the insurance business "have origin in [the] history" of state regulation following *Paul* v. *Virginia,* 8 Wall. (U. S.) 168, 19 L. ed. 357, and that "their solution cannot escape its influence" (328 U. S. at

413). But more than this, it is apparent, as *Robertson* v. *California,* 328 U. S. 440, makes clear, that the regulation of the insurance business, which Congress, by the McCarran Act, left to the States has, as its principal object and purpose the protection of local policy holders from "fraudulent or unsound insurance"; the regulating state it was said, had a "highly 'specialized interest' " in such regulation (328 U. S. at 458, 448).

Prudential, it is true, contains broad dicta, which rely primarily on *Pennsylvania* v. *Wheeling & B. Bridge Co.,* 18 How. (U. S.) 421, 15 L. ed. 435 and *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 61 L. ed. 326, as to the extent of the power of Congress to leave regulation of commerce to the States. But in neither of the two cited cases had Congress simply left regulation to the States; in the *Bridge* case, Congress had itself declared that a particular bridge was not an unlawful obstruction to commerce; in *Clark Distilling,* Congress itself prohibited the transportation of liquor in interstate commerce to States which had adopted prohibition laws. Significantly, *Prudential* itself stands as a warning that one must judge the commerce clause cases by their results, not their varying rationales (328 U. S. at 423-4).

And the results of those cases are these: whenever this Court, relying on Congressional assent, has sustained state regulation otherwise invalid under the commerce clause, the State regulation has a) either been auxiliary to the enforcement of some local policy, conceived without relation to the commerce itself, or b) has been designed to protect the citizens of the State in their contacts with such commerce. Far from recognizing an unlimited power in Congress to authorize any and all state regulation of interstate commerce, this Court, in each case, was at pains to point out why the regulating state had some special interest in the particular subject matter involved.

"Fair trade" laws do not fit this pattern. They necessarily involve more than the protection of local interests, *e.g.*, local retailers from the competition of "price cutters"; no such protection is afforded to the local interests unless the manufacturer or "vendor" so wills it. Indeed, the supposed "due process" justification for fair trade is that the manufacturer's "good will", not the local retailer, must be protected. See *Old Dearborn, supra,* 299 U. S. at 195. If that be so, a State's regulation of interstate commerce, more often than not, is for the benefit of out-of-state interests, since, in any one state, the likelihood is that most of the nationally advertised merchandise which is most commonly fair-traded will have been imported from out of the state. Significantly, in this connection, appellee thought it appropriate to allege in its complaint that its goods are distributed nationally and that it "fair trades" those goods nationally.

The State statute, then, does more than affect interstate commerce as an incident to the enforcement of some policy having its source in essentially local concerns; it embodies a policy with respect to the commerce itself, a policy conceived, in large or major part, to protect the interests of out-of-state manufacturers whose goods are shipped into the state. No previous decision in this Court holds that the states are free, under the commerce clause, to burden commerce under such regulations, even with Congressional approval. It is submitted, therefore, that the second question presented is a substantial one. Moreover, for the reasons adverted to above in the discussion of the due process question, the statute here imposes a burden on commerce not justified by any reasonable relationship between the regulation and any evil sought to be remedied. *Southern Pacific* v. *Arizona, supra.*

Conclusion

The questions involved are complicated and important, as well as "substantial". They affect the validity of the

"fair trade" laws of some 40 states, and important business interests of retailers, wholesalers and manufacturers in nearly every industry. They ought to be resolved only after plenary consideration by this Court. Probable jurisdiction should be noted and the case should be set down for argument.

Respectfully submitted,

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Dated: New York City,
August 27, 1954.

APPENDIX

New Jersey Revised Statutes, Title 56, Sections 56:4-3 to 56:4-6, inclusive.

"Article 2. Contract for Sale or Resale of Certain Commodities

Section 56:4-3. *Definitions.*

As used in this article: 'Producer' means grower, baker, maker, manufacturer or publisher.

'Commodity' means any subject of commerce.

'Library' means the following nonprofit organizations administering a collection of books for nonprofit purposes: the national, State, county, or municipal governments; universities, colleges, schools, archives, offices, museums; and literary, educational, professional, scientific, fine arts or religious societies.

Sec. 56:4-5. *Application of article.*

This article shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices.

This article shall not apply to, or fix or limit prices at which any books may be sold or offered for sale to a library located in this State.

Sec. 56:4-5. *Contracts deemed valid; construction thereof.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trademark, brand, or the name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of this state by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity;

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof;

(c) By any officer acting under orders of any court.

Sec. 56:4-6. *What constitutes unfair competition; civil liability.*

Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 56:4-5 of this title, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of the producer or distributor of such commodity or at the suit of any retailer selling such commodity at not less than the price stipulated in any contract entered into pursuant to the provisions of section 56:4-5 of this Title."

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45:

(a) (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements a described in paragraph (2) of this subsection, nor th exercise or enforcement of any right or right of action a described in paragraph (3) of this subsection shall const tute an unlawful burden or restraint upon, or interferenc with, commerce.

(5) Nothing contained in paragraph (2) of this sul section shall make lawful contracts or agreements provi ing for the establishment or maintenance of minimum o stipulated resale prices on any commodity referred to i paragraph (2) of this subsection, between manufacturer or between producers, or between wholesalers, or betwee brokers, or between factors, or between retailers, or be tween persons, firms, or corporations in competition wit each other.

(6) The Commission is empowered and directed to pre vent persons, partnerships, or corporations, except banks common carriers subject to the Acts to regulate commerce air carriers and foreign air carriers subject to the Civi Aeronautics Act of 1938, and persons, partnerships, o corporations subject to the Packers and Stockyards Act 1921, except as provided in section 227(b) of Title 7, fron using unfair methods of competition in commerce and un fair or deceptive acts or practices in commerce.

The Opinions Below

Opinion in the New Jersey Supreme Court:

SUPREME COURT OF NEW JERSEY

No. A89 September Term 1953

THE LIONEL CORPORATION, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff-Appellant,

vs.

GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, and GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant-Respondent.

Argued February 8, 1954. Decided April 5, 1954.

On appeal from Superior Court, Chancery Division, whose opinion is reported in 27 N. J. Super. 54.

Mr. Samuel Voltaggio argued the cause for the Appellant.

Mr. Sidney A. Diamond, of the New York Bar, argued the cause for the Respondent. Mr. Meyer E. Ruback, and Messrs. Roosevelt, Freidin & Littauer, of the New York Bar, of counsel. Messrs. Ruback, Albach & Weisman, attorneys.

The opinion of the court was delivered by BURLING, *J.*

This appeal stems from a civil action instituted for the purpose of obtaining injunctive and compensatory relief under the "nonsigner" clause of the New Jersey Fair Trade Act, R. S. 56:4-3, *et seq.* The complaint was filed by The Lionel Corporation, a corporation of the State of New York authorized to do business in New Jersey (hereinafter referred to as Lionel) in the Superior Court, Chancery Division. The complaint named as defendant Grayson-Robinson Stores, Inc., a corporation of the State of California authorized to do business in the State of New Jersey, and Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square (hereinafter referred to as the defendant). The Superior Court, Chancery Division, entered summary judgment for the defendant. *Lionel Corp.* v. *Grayson-Robinson Stores*, 27 N. J. Super. 54 (Chancery Division, 1953). Lionel's appeal to the Superior Court, Appellate Division, was certified by us prior to hearing there.

Lionel manufactures and produces "toy" electric trains, parts, accessories and model railroad equipment under the brand and trade names of "Lionel" and "Lionel Trains." It exercises price regulation by means of resale price maintenance agreements, commonly termed "fair trade contracts," and has entered into agreements of that character with retailers in business in this state.

The defendant operates a nationwide chain of retail stores, including one in the city of Newark, New Jersey. The defendant, although no answer has been filed, admits that it did offer for sale, and sold, Lionel's branded and trade-marked products at less than the prices stipulated in Lionel's resale price maintenance agreements, and insists upon its present right to do so. Lionel contends that the defendant has sold Lionel's "fair trade" protected products at prices as much as 25% to 30% less than Lionel's resale contract prices. This is supported by affidavits and is not controverted.

Lionel's complaint, hereinabove mentioned, asserting these matters of fact and seeking injunctive relief and compensatory demages in reliance thereon, was filed and service was effected upon the defendant. The latter thereupon moved for summary judgment (without having filed an answer to the complaint, see R. S. 4:58-2, formerly *Rule* 3:56-2). The defendant's motion for summary judgment asserted (a) there was no genuine issue as to any material fact challenged and the defendant was entitled to summary judgment as a matter of law, and (b) Lionel's complaint failed to state a claim upon which relief could be granted.

The Superior Court, Chancery Division, granted the defendant's motion and entered summary judgment in favor of the defendant. The opinion filed by the court expressed its findings of fact and conclusions of law. The court concluded that the complaint and affidavits filed showed palpably that there was no genuine issue as to any material fact. Further the trial court found that the New Jersey Fair Trade Act, R. S. 56:4-3, *et seq., supra,* had been held to be constitutional by New Jersey courts of last resort upon the United States Supreme Court decision in *Old Dearborn Distrib. Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109, 106 A. L. R. 1476 (1936), and that the *Old Dearborn* case, *supra,* had not been overruled by *Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U. S. 384, 95 L. ed. 1035, 19 A. L. R. 2d 1119 (1951). However the Superior Court, Chancery Division, determined that price adherence may be secured only by virtue of voluntary agreement and therefore compulsory adherence to resale prices stipulated by the manufacturer or producer, *i.e.,* the adherence to such prices required on the part of a retailer who has not voluntarily become a party to the resale price maintenance agreements, such requirement attaching under the "nonsigner" provision of the New Jersey Fair Trade Act, R. S. 56:4-6, is unconstitutional.

On this appeal several questions are involved. These are grouped into four categories. Principal among these is the general question whether the "nonsigner" portion of the New Jersey Fair Trade Act, R. S. 56:4-6, *supra*, is constitutional. Secondarily the questions involved include the constitutionality and application of the McGuire Act, P. L. 542, 82nd Congress, 2nd Session, c. 745 (July 14, 1952). Finally the applicability of the phrase "price stipulated" as set forth in R. S. 56:4-5 and R. S. 56:4-6 under the circumstances of this case and the applicability of factual defenses (alleged lack of notice of Lionel's resale price maintenance agreements, alleged unlawful combination, *i.e.*, "horizontal" price fixing) are included among the questions involved.

I. Constitutionality of The New Jersey Fair Trade Act, R. S. 56:4-3, *et seq.*

The Fair Trade Act is asserted by the defendant to violate the state and federal constitutions upon three grounds. The first two of these are, (a) that the Fair Trade Act constitutes a deprivation of property of the defendant without due process of law or a denial of equal protection of the law, in contravention of the 14th Amendment to the United States Constitution, and also of N. J. Const. 1947, Art. I, pars. 1, 5, and (b) that the Fair Trade Act constitutes an unlawful delegation of legislative power, see N. J. Const. 1947, Art. IV, sec. I, par. 1, and in this respect also violative of the due process clause of the 14th Amendment, *supra*. The third ground of constitutional attack, that the Act creates an unlawful burden upon interstate commerce and therefore violates Art. I, sec. 8, of the United States Constitution, will be adverted to in our conclusion, *post*, concerning the McGuire Act.

This appeal is the first occasion on which an appeal to this court has expressly raised the question of constitu-

tionality of the Fair Trade Act in relation to due process of law, equal protection of the law and delegation of legislative power, although we have heretofore observed in the course of detailing the historical development of "fair trade" that the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, 121 N. J. E. 585, 587 (E. & A. 1937) expressly followed the *Old Dearborn* case, *supra*, in this respect. See *General Electric Co.* v. *Packard Bamberger & Co.*, 14 N. J. 209, 215 (1953); *Johnson & Johnson* v. *Charmley Drug Co.*, 11 N. J. 526, 536 (1953).

We find no basis pertinent to the resolution of the constitutional questions involved upon which to differentiate the Illinois statute considered in the *Old Dearborn* case, *supra*, from the New Jersey Fair Trade Act. To overrule the decision of the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, *supra*, would require a declaration that we are no longer bound by the *Old Dearborn* case, *supra*. It is our conclusion that the *Old Dearborn* case, *supra*, has not been overruled by the United States Supreme Court and is dispositive here.

Under the circumstances of this case the application of the New Jersey constitutional provisions is governed by the construction and application accorded the 14th Amendment. As we have heretofore stated these questions were directly considered and disposed of with a declaration of constitutionality in the *Old Dearborn* case, *supra*, and we are bound by that decision of the United States Supreme Court until it is overruled by the United States Supreme Court. In *Pennekamp* v. *Florida*, 328 U. S. 331, 335, 90 L. ed. 1295, 1297 (1945), the United States Supreme Court expressly declared:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that intrument which require interpretation to resolve judicial issues. . . ."

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The decision of the United States Supreme Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (1951) did not reach the issue of contitutionality of the "nonsigner" clause of the fair trade acts under the 14th Amendment, but was concerned only with interpretation of the federal anti-trust laws and the application of the "nonsigner" clauses of state fair trade acts to interstate commerce. Contrary to the argument asserted by the defendant, we cannot *assume* that the United States Supreme Court would overrule the *Old Dearborn* case, *supra*, if the opportunity to do so should be presented to that tribunal. Such an assumption, even if it were open to us, would be unrealistic in view of the United States Supreme Court's denial of *certiorari* in *Schwegmann Bros. Giant Super Market* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th cir. 1953) cert. den. U. S. , 98 L. ed. (Adv. Ops.) 57, reh. den. U. S. , 98 L. ed. 154 (1953).

II. Interstate Commerce and The McGuire Act.

The defendant in the proceedings in the Superior Court, Chancery Division and on the appeal to this court has contended that the McGuire Act, P. L. 542, 82nd Congress, 2nd Session, c. 745 (July 14, 1952), constitute an unconstitutional delegation by Congress of the power to fix prices and an unconstitutional delegation by Congress of its power to regulate interstate commerce. United States Constitution, Art. I, sec. 8.

In *General Electric Company* v. *Packard Bamberger & Co., Inc., supra*, we recently held that the McGuire Act was effective to permit application of the New Jersey Fair Trade Act to interstate commerce. The conclusions expressed in our opinion in the *General Electric Company* case, *supra*, are pertinent here although constitutionality of the McGuire Act was not directly resolved therein. Suc-

cinctly, we determine that the McGuire Act is not a delegation of power either to fix prices or to regulate interstate commerce, but is a declaration of consent by Congress that the "nonsigner" provisions of otherwise valid state "fair trade" statutes shall operate on commodities traveling in interstate commerce. The keystone of our decision in the *General Electric Company* case, *supra*, was *Re Rahrer* (*Wilkerson* v. *Rahrer*), 140 U. S. 545, 35 L. ed. 572, 575 (1891). That case and the other authorities discussed in our decision in the *General Electric Company* case, *supra*, control our decision here. *Pennekamp* v. *Florida*, *supra*.

The defendant also asserts that the New Jersey Fair Trade Act constitutes an unlawful burden on interstate commerce. Under the decisions above adverted to this argument is without merit.

III. The "Price Stipulated".

The provisions of the New Jersey Fair Trade Act purport to validate contracts in which the buyer agrees not to resell the seller's branded or trade marked property "except at the price stipulated by the vendor." R. S. 56:4-5, *supra*. The "nonsigner" clause provides that sale, etc., of such property "at less than the price stipulated in such a contract entered into under R. S. 56:4-5, *supra*, is unfair competition. R. S. 56:4-6, *supra*.

The defendant contends that Lionel's "fair trade" contracts failed to comply with the statute because they contained minimum rather than absolute or stipulated prices. The facts are undisputed. This is a question of law and was determined in the plaintiff's favor by the trial court. In this respect the complaint and affidavits palpably show no genuine issue of a material fact. The contract language is unambiguous and clearly states a stipulated price. The defendant's contention in this respect is without merit and it devolves upon the court to declare the judgment which the law imposes.

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IV. Other Defenses.

The defendant also asserted that the "nonsigner" clause of the New Jersey Fair Trade Act (R. S. 56:4-6, *supra*) does not apply to commodities acquired prior to the acquisition of knowledge of the plaintiff's New Jersey resale price maintenance agreements and the prices stipulated therein. The construction asserted by the defendant appears to be required by the clear language of the statute. However as applied to the present case this question is moot as to future matters, since defendant's affidavit shows that it now has knowledge and it was stipulated at the trial level that defendant has none of Lionel's articles in stock. The question is also moot in this case as to past sales by the defendant because there is palpably no genuine issue as to the fact that all New Jersey sales made by it were effected prior to knowledge of Lionel's *New Jersey* resale price maintenance agreements. R. S. 56:4-6, *supra*, requires that underselling, to be actionable, be effected "willfully and knowingly" with respect to prices "stipulated in any contract entered into pursuant to the provisions of section 56:4-5." The complaint and affidavits on file demonstrate that prior to December 17, 1952 the defendant had no knowledge of Lionel's New Jersey "fair trade" contracts, and that no violations of R. S. 56:4-6, *supra*, occurred thereafter.

The defendant also asserts that Lionel's New Jersey "fair trade" contracts are void because they are part of Lionel's nationwide price-fixing policies (adverted to in the complaint). It is argued by the defendant that inasmuch as resale price maintenance is not sanctioned in some of the states, Lionel's policy is in restraint of trade and unlawful.

As a matter of law this defense is devoid of merit as we are bound by the *Old Dearborn* case, *supra*, in this respect. The complaint and affidavits on file show palpably

that there is no genuine issue as to any material fact concerning this alleged defense. The defendant's premise is legally unsound if the New Jersey Fair Trade Act is valid. That statute, and the McGuire Act, contemplate just such a situation. "Vertical" price maintenance is accorded protection here and the mere fact that other states prohibit resale price maintenance of this category does not invalidate the New Jersey "fair trade" agreement under the constitutional philosophy of the *Old Dearborn* case, *supra*. However, strictly "horizontal" price maintenance, namely contract between manufacturers or between wholesalers, or between retailers, which is not involved in the asserted defense, continues to be illegal in this state. *Pazen* v. *Silver Rod Stores, Inc.*, 130 N. J. E. 407, 411-413 (E & A 1941). *Cf. General Electric Company* v. *Packard Bamberger & Co., Inc., supra.*

Conclusion

For the reasons expressed in this opinion the judgment of the Superior Court, Chancery Division, will be reversed insofar as it denied injunctive relief to Lionel, and such relief will be ordered granted to Lionel, *cf. Sheild* v. *Welch*, 4 N. J. 563, 566-567 (1950), but the judgment will be affirmed insofar as it denied Lionel's claim for recovery of damages for past sales. The cause will be remanded to the Superior Court, Chancery Division, for entry of an amended final judgment consistent with this opinion.

Inasmuch as neither party to this appeal completely prevails no costs will be allowed to either party.

Heher, *J.*, concurring.

The holding of *Old Dearborn Distilling Co.* v. *Seagram-Distillers Corporation*, 299 *U. S.* 183, 57 *S. Ct.* 139, 81 *L. ed.* 109 (1936), was that the "non-signer" provision of the typical Fair Trade Law, as a trade technique essential

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to the protection of the manufacturer's or producer's property interest in his trade-mark, brand or like identifying device, did not work a denial of due process of law or the equal protection of the laws or constitute an unlawful delegation of the legislative function. But the inquiry here is whether the State law comports with the security given by our own Constitution to the general principle of freedom of trade.

There is now reason to believe that the Fair Trade principle is used by distributors as a device to stifle price competition, in the name of protection to the producer's property right in his trade-mark. *Eli Lilly & Co.* v. *Schwegmann Bros. Giant Super Markets*, 109 *Fed. Supp.*, ostensibly to serve the producer's interest, but in reality for their own gain; and such is perforce an arbitrary and unreasonable regulation of the non-signer's business and a delegation of the legislative power in violation of our own Constitution.

The record does not show that such is the case here or that the State law is in practice but a regulatory mechanism in restraint of price competition and thus obnoxious to our own constitutional limitations, rather than a means of serving the professed legislative policy of protection for the producer's property in his trade-mark.

Perhaps, the time has come for a legislative reassessment of the policy in the context of prevailing trade practices and concepts and the teachings of experience. There is not sufficient ground in the presentation here for denying the relief sought by plaintiff.

I concur in the result.

Opinion in the New Jersey Superior Court, Essex County:

FREUND, *J. S. C.*

This proceeding brought by The Lionel Corporation seeks to enjoin the defendant, Grayson-Robinson Stores, Inc., from selling or offering for sale "Lionel Trains" or "Lionel Products", manufactured by the plaintiff at less than the list prices established by the plaintiff. The action is brought under the New Jersey Fair Trade Act, R. S. 56:4-3 et seq., and under the McGuire Act, 66 Stat. 632, 15 U. S. C. A. Sec. 45. The defendant has moved for summary judgment as a matter of law.

The complaint and affidavits submitted on the motion palpably show that there is no genuine issue as to any material fact. The following facts are gleaned from the pleadings: The plaintiff, a corporation of the State of New York, authorized to do business in this state, is engaged in interstate commerce, manufacturing toy electric trains under the trade name of "Lionel" and has a price-fixing policy which it endeavors to maintain by means of retail price maintenance agreements and by prices listed in its catalogs. The defendant, a corporation of the State of California, authorized to do business in this state, owns a nation-wide chain of retail stores—one in the City of Newark. The policy of the defendant is to operate its stores on a self-service, cash-and-carry basis, and to sell its merchandise at minimum prices. The defendant asserts that it has never entered into any "fair trade" contract and it has been stipulated that it has no contract with the plaintiff.

The plaintiff has entered into price maintenance agreements with retailers in this state, of which fact it alleges the defendant had notice. The defendant denies having notice but admits it did offer for sale and sold the plain-

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tiff's products at less than the stated list prices, and insists on its right to do so.

The plaintiff contends that the McGuire Act, supra, has encompassed nonsigners and that the defendant's practice of price-cutting, with notice of the plaintiff's price maintenance contracts, constitutes violation of the New Jersey Fair Trade Act, entitling it to an injunction. R. S. 56:4-3 et seq.

In opposition, the defendant presents many points, among them that the New Jersey Fair Trade Act and the Federal McGuire Act, insofar as they attempt to bind nonsigners, are unconstitutional: (1) being in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and of Article I, Section 1, of the State Constitution, because they deprive the defendant of its property right to sell merchandise at the price it sees fit; and (2) because they unlawfully delegate to private persons, manufacturers and producers, the power to fix prices of commodities not affected with a public interest, without any standards or regulations governing the exercise of the delegated power.

The plaintiff urges that state fair trade statutes were declared to be valid by the United States Supreme Court in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 158, 57 S. St. 139, 81 L. Ed. 109, (1936), and that thereupon the courts of this state upheld the constitutionality of our Fair Trade Act and enjoined nonsigners from selling below fixed prices. Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, (E. & A. 1937). Further, that the defendant is asking this court to overrule these decisions. The defendant concedes that the Court of Errors and Appeals held that our statute did not violate the due process clause, but argues that the court did not pass upon its constitutionality on the issue of unlawful delegation of legislative power. The defendant urges that, to the extent that the United States Supreme

Court has not overruled the Old Dearborn case by its decision in Schwegmann Bros. v. Calvert Distillers Corporation, 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 19 A. L. R. 2d 1119, (1951), this court is free to disregard it; and that the validity of the McGuire Act has not been passed upon by the Supreme Courts of either the United States or of this state.

The historical background of fair trade legislation and decisions pertaining thereto, including the Schwegmann case, are set forth in the opinions of this court and of the Supreme Court of New Jersey in Hoffmann-LaRoche, Inc. v. Weissbard and Johnson & Johnson v. Charmley Drug Co., 19 N. J. Super. 210, (Ch. 1952), affirmed 11 N. J. 541 and 526, (1953). Here, it will suffice to say that price-fixing agreements were illegal as against public policy. Ingersoll v. Goldstein, 84 N. J. Eq 445, (Ch. 1915); prohibited as restraints of trade under the Sherman Anti-Trust Act, 26 Stat. 209, c. 647; 15 U. S. C. A. Sec. 1, (1890); and held violative of the Federal Trade Commission Act, 38 Stat. 717, c. 311, 15 U. S. C. A. Sec. 41, (1914). Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, (1911). Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, (1922). However, in 1936, the United States Supreme Court in the Old Dearborn case, supra, upheld the validity of state fair trade statutes sanctioning agreements for retail price-fixing with reference to trademarked or branded commodities sold in fair and open competition with other commodities of the same general class, binding also upon retailers not parties to the contract who had notice of the price agreement. The purported purpose of fair trade statutes is to protect owners of trademarked goods, or distributors, who have built up a good-will for the product, from injurious practices.

In 1937, in order to implement state fair trade acts and to alleviate the proscriptions of the Sherman Anti-Trust

Act upon price maintenance agreements valid under local law, Congress enacted the Miller-Tydings Amendment to the Sherman Act, Title VIII, 50 Stat. 673, 693, c. 690, 15 U. S. C. A. Sec. 1. That amendment provides immunity from the ban of the Sherman Act for "contracts or agreements prescribing minimum prices for the resale" of specified trademarked or branded commodities "when contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. However, the immunity is limited to "vertical" and not to "horizontal" price-fixing by those in competition with each other at the same functional level. The latter continue to be prohibited by the Sherman Act. The New Jersey Fair Trade Act has a nonsigner clause, which was lacking in the Miller-Tydings Amendment. Following the Old Dearborn case, our courts in numerous cases enjoined nonsigners from failing to adhere to price stipulations of the manufacturer. See cases cited in Hoffman-LaRoche, Inc. v. Weissbard, 19 N. J. Super. 210, at page 215.

In Schwegmann Bros. v. Calvert Distillers Corp., supra, the United States Supreme Court held that the Miller-Tydings Amendment immunized only contracts or agreements prescribing minimum resale prices of trademarked commodities in interstate commerce, and that a retailer who had not signed a contract for price maintenance could not be subjected to price observance since the amendment did not encompass noncontracting retailers. On the authority of this case, injunctions against nonsigners were denied in Hoffman-LaRoche, Inc. v. Weissbard, supra, and Johnson & Johnson v. Charmley Drug Stores, supra, and injunctions which had previously been issued were vacated. Johnson & Johnson v. Weissbard, and Burroughs Welcome & Co. (U. S. A.), Inc. v. Weissbard, 11 N. J. 552 (1953).

To overcome the effect of the decision in the Schwegmann case, Congress, on July 14, 1952, adopted the McGuire Act as an amendment to the Federal Trade Com-

mission Act, 15 U. S. C. A. Sec. 45. It purports to include nonsigners within the immunity granted by the Miller-Tydings Act. The pertinent section reads as follows:

> "(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale or selling is or is not a party to such contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby." 15 U. S. C. A. Sec. 45, (a).

Paragraph (4) of the same subsection of the McGuire Act provides that the exercise or enforcement of any right of action under the state statute or public policy should not "* * * constitute an unlawful burden or destraint upon, or interference with, commerce."

Reverting to the arguments of the defendant, I do not consider that the United States Supreme Court has by the Schwegmann decision reversed its decision in the Old Dearborn case. That tribunal has not hesitated to reverse itself whenever the situation demanded, and to say so unequivocally. Nor is it necessary to review the constitutionality of our fair trade act upon ostensible new grounds now raised by the defendant. The court of last resort of our state having upheld its constitutionality, it must presently be assumed to be constitutional on all grounds; and if perchance the act be invalid for reasons not yet argued, such a ruling may be made by the court of last resort upon an appropriate presentation.

Admittedly, both the plaintiff and the defendant are engaged in interstate commerce. The New Jersey Fair

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Trade Act was intended to apply and applies only to intrastate transactions. Hence, if the plaintiff is to prevail, it must be under the McGuire Act. The issue is whether that statute which purports to include nonsigners within the amendment to the Federal Trade Commission Act and which was intended to supply this deficiency in the Miller-Tydings Act, has effectively overcome the obstacles indicated by the Supreme Court of the United States in the Schwegmann case. Can a court of equity lawfully compel a non-assenting retailer to submit to a price-fixing schedule contained in an agreement or contract between a manufacturer of a trademarked commodity and other retailers? Has the pre-Schwegmann concept of the binding effect upon nonsigners been revitalized, or does the interpretation of the opinion in the Schwegmann case preclude such a conclusion?

Courts of other jurisdictions which have considered the validity of the McGuire Act are in conflict. It was held valid in Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 Fed. Supp. 269 (East Dist. La. 1953); General Electric Co. v. S. Klein-on-the-Square, Inc., 129 N. Y. L. J. 583, 1953 C. C. H. Tax Cases, Para. 67, 443 (N. Y. Sup. 1953); Cal-Dak Co. v. Sav-on Drugs, 254 P. 2d 497 (Cal. Sup., March 17, 1953). It was declared unconstitutional by the Supreme Court of Georgia in Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 73 S. E. 2d 161 (Feb. 24, 1953) and state fair trade acts were held unconstitutional by the Supreme Courts of Michigan and Florida in Shakespeare Co. v. Lippmann's Sporting Goods Co., 334 Mich. 109, 54 N. W. 2d 268 (1952) and Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (1949). In the absence of any decision by the United States Supreme Court or the New Jersey Supreme Court, an independent interpretation may be made.

As was observed in Hoffman-LaRoche, Inc. v. Weissbard, 19 N. J. Super. 210, there are valid and forceful eco-

nomic arguments on all sides of the question of the social desirability of fair trade laws. Under fair trade, the price level is probably higher than would obtain under active price competition. The wisdom of fair trade from the social aspect is at least debatable, even though uneconomical in a particular sense. A court is concerned with legality, not social, economic or political philosophy—those considerations are for other forums. It is trite to say that "competition is the life of trade." Competition, whether desirable or not, must be lawful, as is clearly indicated by the many laws which give redress when it is unlawful. Suppression of competition is incompatible with the precepts of a free society. However, price-fixing as an incident to the good-will of a trademarked or branded commodity has been held to be lawful by the decision in the Old Dearborn case. But even a lawful end may not be accomplished by unlawful means, and price adherence may be secured lawfully only through voluntary agreement.

In my view, the Supreme Court of the United States did not reverse its decision in the Old Dearborn case by its ruling in the Schwegmann case—the two opinions are to be read together. In the later case, the court emphasized that price-fixing agreements are valid so long as they are obtained through contract or agreement. What is rendered illegal is compulsory subjection to price adherence. The full significance of the opinion is missed if we fail to grasp from its dynamic phrases the categorical directive that only those who have contracted or agreed, expressedly or impliedly, or who have otherwise voluntarily consented, to be bound, may be held to price observance. This is the theme repeated throughout the opinion and demonstrated by the following excerpts:

> "When they seek * * * to impose price fixing on persons who have not contracted or agreed to the scheme, * * * that is price fixing by compulsion. That is not following the path of consensual agreement;

that is resort to coercion, * * * price maintenance is limited to *voluntary* engagements.

"Contracts or agreements convey the idea of a cooperative arrangement * * *, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing * * *

"* * * we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well."

I am led to the conclusion that a court of equity may not issue an injunction to compel a non-contracting, non-assenting retailer to adhere to a price-fixing schedule established by a manufacturer or producer of a commodity not affected by a public interest, and that to that extent the McGuire Act is ineffective. This result renders it unnecessary to advert to the other points raised by the defendant.

Judgment accordingly.

The Judgments Below

MANDATE ON MODIFICATION

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 1538

Civil Action on Appeal

THE LIONEL CORPORATION, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff-Appellant,

vs.

GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, and GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant-Respondent.

This cause having been duly argued before this Court by Mr. Samuel Voltaggio, counsel for the appellant and Mr. Sidney A. Diamond, of the New York Bar, counsel for the respondent, and the Court having considered the same.

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division be and the same hereby is modified; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the

record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 5th day of April, 1954.

s/ JOHN H. GILDEA
Clerk of the Supreme Court

(A True Copy)

JOHN H. GILDEA
Clerk

FILED
Apr 5 1954

JOHN H GILDEA
Clerk

AMENDED SUMMARY JUDGMENT

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
Essex County Docket
Civil Action

The Lionel Corporation, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff,

vs.

Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, and Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant.

It appearing that a summary judgment in favor of the defendant, Grayson-Robinson Stores, Inc., was entered by this Court on September 11, 1953; and it further appearing that the plaintiff filed an appeal from said judgment, which was argued on February 8, 1954 and decided on April 5, 1954 by the Supreme Court of New Jersey, and that thereafter its mandate for modification duly issued; and it further appearing that such mandate on modification has been filed with the Clerk of this Court, and that no application for rehearing has been granted or is pending; and other good and sufficient reason appearing therefor;

It is on this 2nd day of June, 1954, Ordered and Adjudged that the summary judgment entered herein on September 11, 1953 be and it hereby is amended and modified; and

It is further Ordered and Adjudged that the defendant, Grayson-Robinson Stores, Inc., its officers, agents, servants, employees, representatives, successors and assigns, and any and all persons acting under its authority and control, or in active concert or in participation with it, be and they hereby are permanently enjoined and restrained from advertising, offering for sale or selling at retail in the State of New Jersey any "Lionel Trains" or "Lionel Products" manufactured by the plaintiff and bearing the plaintiff's trade-marks, brands and trade names, and including "Lionel" electric toy trains, parts, accessories and toy railroad equipment incidental thereto, at prices lower than the retail resale prices now established therefor by the plaintiff by contracts entered into between the plaintiff and other retail dealers in such commodities in the State of New Jersey, or at such retail resale prices as may hereafter be established for such commodities by the plaintiff under the Fair Trade Law of New Jersey; and

It is further Ordered and Adjudged that the plaintiff's claim for the recovery of damages arising out of sales by the defendant of "Lionel" commodities manufactured by the plaintiff, which were acquired by the defendant prior to December 17, 1952, be and it hereby is dismissed; and

It is further Ordered and Adjudged that no costs be taxed or allowed to either party against the other.

/s/ Mark A. Sullivan, Jr.
J. S. C.

Approved as to form only.
Samuel Voltaggio
Atty for Pltff

Meyer E. Ruback
Atty for Deft